SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 325

EDWARD E. STEVENS,

Petitioner,

vs.

CLARA M. EDWARDS, ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals rendered in the above case will be found as follows:

> Edward E. Stevens, Appellant *v.* Clara M. Edwards, et al., Appellees, C. C. A. 5th Circuit, 112 Fed. Rep., 2d Series, Page 534, Advance Sheet No. 3.

There was no opinion by the District Court and his findings are incorporated in the order appealed from which was entered on the first of February, 1940, and will be found at R. 49 to 54, inclusive.

II.

1. Jurisdiction is invoked under Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Section 347.

2. The date of the judgment to be reviewed is June 13, 1940. Petition for rehearing was denied July 24, 1940.

3. The nature of the case, and the fact that the rulings were such as to bring this case within the jurisdictional provisions relied on, are fully disclosed in the petition for writ of certiorari, under Subdivisions A and B respectively. Hence, in the interest of brevity these statements are not here repeated.

III.

Statement of the Case.

Inasmuch as the statement of the case is set forth in Subdivision A of the petition for writ of certiorari, for the sake of brevity, repetition of same will be omitted here.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In affirming the District Court in its distribution to Clara M. Edwards of the sum of $1,421.20 out of the total award of $1,942.50.

2. In view of the circumstances set forth in Subdivision A of the attached petition for writ of certiorari, in ignoring the local Florida law as stated in the case of

Citation:

Holmberg et al. v. *Hardee, Governor,* 90 Fla. 787, 108 So. 211

that in order to convert a deed absolute in its terms into a mortgage, it is necessary that the understanding or intention of *both* parties to that effect should be concurrent and the same.

3. In ruling that the case of
Citation:
Markell v. *Hilpert*, — Fla. —, 192 So. 392

where the deed was made by the same person to whom the option was given and where there were no circumstances of equitable estoppel and misrepresentations such as exist in our case controlled the award in the present case.

V.

ARGUMENT.

Summary of the Argument.

Petitioner claims that he owned the land condemned, and, therefore, was entitled to the award. He acquired the land on the understanding that he was acquiring absolute title thereto. He did not give his option to purchase to the corporation which made him the deed, namely: the Peninsula Land Company, but to a third person, namely: Clara M. Edwards. This was a method devised by Gus C. Edwards to satisfy Stevens' demand for absolute title. Mrs. Edwards is estopped by her husband's action to claim now that the method only resulted in giving Stevens a mortgage which he had definitely refused to accept. We now cite authorities to the Questions #1, 2, 3 set forth in the foregoing petition for certiorari.

Authorities on Questions No. 1 & 2.

It is the law of Florida that to convert a deed, absolute in its terms, into a mortgage, it is necessary that the under-

standing and intention of *both* parties to that effect be concurrent and the same.

Holmberg v. *Hardee*, 90 Fla. 787, 108 So. 211;
McKinney v. *Gainey*, — Fla. —, 118 So. 917.

Mere secret intention of either party as to the purpose of the instrument will not control.

Stovall v. *Stokes*, 94 Fla. 717, 115 So. 828.

Note Below: Hence, if Edwards, despite his representations to Stevens, secretly intended the deed as a mortgage, his private intent cannot overrule the language of the deed.

The burden of proving an absolute deed to be a mortgage is upon the grantor.

Brumick v. *Morris*, 131 Fla. 46, 178 So. 564.

A deed absolute in its terms will not be construed as a mortgage where, after its execution there remains no indebtedness from the grantor to the grantee.

Brumick v. *Morris, supra.*

Note Below: After the Peninsula Land Company executed its deed to Edward E. Stevens on February 12, 1937, there remained no indebtedness from the Peninsula Land Company to Edward E. Stevens. Mrs. Edwards merely had the privilege, until November 1, 1937, to purchase (not repurchase) the land.

The Florida cases holding an absolute deed to be a mortgage where there was an option to reconvey are all where the option was to *re*convey to the grantor and not, as in our case, where the option is given to a third person who never had owned the title.

Franklin v. *Ayer*, 22 Fla. 654;
Brown v. *Banning*, 71 Fla. 208, 71 So. 327;
Brumick v. *Morris, supra;*
Markell v. *Hilpert, supra.*

Such was the fact in the case of

Markell v. *Hilpert*, — Fla. —, 192 So. 392,

which was the authority upon which the District Judge bottomed his decision in our case. Hence, the decision in our case is contrary to the applicable local law which is controlled by the above-cited propositions from the cases of *Holmberg* v. *Hardee, supra,* and *Brumick* v. *Morris, supra.*

Authorities on Question No. 3.

The lands involved in this case are wild and vacant lands. When the Peninsula Land Company conveyed same to Edward E. Stevens, the constructive possession of said lands passed to Stevens. On January 4, 1940, when Peninsula Land Company made its deed of said lands to Clara M. Edwards, Edward E. Stevens was in constructive possession of said lands. Hence, the deed from Peninsula Land Company to Clara M. Edwards was from a party out of possession to a party out of possession of land in the adverse possession of Stevens. Such a deed was champertous and void as to Stevens.

Citation:

A deed by one to land which is in the adverse possession of another is void as against such adverse claimant. *Watkins* v. *Emmerson,* 88 Fla. 86, 102 So. 10.

Conclusion.

By the judgment of the District Judge appealed from, the sum of $1,421.20 of the total award of $1,942.00 was taken from Edward E. Stevens who was the record owner of the property condemned and given to Clara M. Edwards, who had never held any right, title or interest therein. In accomplishing this inequitable result the District Judge violated those rules and principles applied by the Supreme Court of Florida in like cases hereinbefore cited as authori-

ties to Questions No. 1 and 2. It was the duty of the District Judge to follow the State decisions. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188. The violation by the District Court of the said State court rules and principles was due to a misconstruction on the part of the District Judge of the meaning and effect of the case of *Markell* v. *Hilpert,* — Fla. —, 192 So. 292. The rules and principles misapplied were those established by the Florida court as to the circumstances when an absolute deed is to be deemed a mortgage. This decision of an important question of local law contrary to the applicable local decisions amounts to want of "due process of law". This is so because due process of law, when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. *Endicott-Johnson* v. *Encyclopedia Press,* 266 U. S. 285, 69 L. Ed. 288.

Respectfully submitted,

GEORGE PALMER GARRETT,
Counsel for Petitioner,
Exchange Building,
Orlando, Florida.